face of an order of probate declared by statute to be *prima facie* proof of validity. Not only was the case on its merits a very extreme one in which to apply the rule, but two prior decisions of the Court of Appeals of Ohio were thereby overruled. A dissenting opinion by JONES, J., in which no other judge concurred, argued that the statute referred to made the scintilla rule inapplicable to will contests, but did not question the propriety of the rule as a general principle of law. Evidently the Ohio Supreme Court feels irrevocably committed to this all but obsolete doctrine, and a statute will probably be necessary to get rid of it. E. R. S.

JUVENILE COURTS AND PRIVILEGED COMMUNICATIONS. — In the case of *Lindsey* v. *People,* (Colo., 1919) 181 Pac. 531, the Supreme Court of Colorado has held that Judge Lindsey of the Juvenile Court of Denver could not refuse to testify as to a communication made to him by a child who was at the time of the communication suspected of crime and against whom proceedings were later taken in the Juvenile Court. The decision was by a vote of four to three, and a vigorous dissenting opinion was written by Justice Bailey and concurred in by Justices Scott and Allen.

The case arose under the following circumstances: a man had been killed and his wife was suspected of murdering him; their twelve-year-old son was also under suspicion. The boy went to Judge Lindsey's chambers in the Juvenile Court to consult the Judge about the case and, after being assured by the Judge that any statement made to the latter would be confidential and that no disclosure of the same could be forced from the Judge, the boy made a statement as to the circumstances of the killing of his father. The wife of the deceased was later tried for the murder of her husband, and the boy testified in her behalf. The prosecution then sought to show that the boy had made a statement to Judge Lindsey which was inconsistent with his testimony at the trial, and called upon the latter to testify as to the statement made to him by the boy under the circumstances above detailed. Judge Lindsey declined to disclose the information he had thus received, on the ground that the communication was privileged; he persisted in his refusal after the trial court had ordered him to answer, and was found guilty of contempt of court and fined. The Supreme Court upheld the judgment of the court below.

It is admitted in both the prevailing and dissenting opinions that the case is one of first inpression; the dissenting opinion justifies the claim of privilege by pointing out analogies to other and similar situations in which the claim is clearly recognized; the majority opinion denies the privilege because no clear and unmistakable basis for it is contained in the various sections of the Colorado Statutes cited in the brief of the plaintiff in error. It is interesting that both opinions, in discussing the general question of privilege, rely on Wigmore on Evidence, § 2285, where the learned author states the rule as follows: "(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3)

the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." It seems perfectly clear that all of these requirements exist in the case at bar. Indeed the majority opinion tacitly admits that all of them exist except (4), as to which it says: "Considering the importance of the case on trial to the defendant as well as the people, and the rare instances in which courts are likely to be confronted with a similar situation, it appears to us beyond question that the benefit to be gained by the correct disposition of the litigation was * * * infinitely greater than any injury which could possibly inure to the relation by the disclosure of the communication." And it is really on this point that the dissent rests. The majority opinion goes on to demonstrate with metriculous refinement that the situation of the confidant in the present case is not precisely the same as that of an attorney dealing with a client, nor the same as that of a public officer dealing with confidential matters communicated to him officially (though on both of these points the distinctions made by the court are highly technical); the opinion also holds that no relation of confidence existed between Judge Lindsey and the boy under the provisions of the Juvenile Court Law because no petition had been filed and there was therefore no case pending against the boy.

The dissenting opinion, though suggesting the close similarity of the attorney-client and the officer-informer cases (on the latter point see the recent case of *State* v. *Tune*, 199 Mo. App. 404), bases its argument on the contention that the Juvenile Court is established by law for the carrying out of an important public duty, that it is absolutely essential to the proper carrying out of such duty that there be a high degree of confidence between the Judge and the children appearing before him, and that "anything which tends to destroy the trust of the child in the court * * * must necessarily nullify all possibility of good which otherwise might * * * be accomplished." It seems clear that the view of the dissenting opinion is correct, and that the privilege claimed by Judge Lindsey ought to be recognized.

The prevailing opinion is undoubtedly deserving of Justice Bailey's description of it as "highly technical in character, narrow in construction, and little calculated to give helpful if any assistance in the enforcement of the Juvenile Court Law." If the opinion had recognized the propriety of the privilege contended for, and had regretted that the extension of such privilege lay with the legislature and not with the court, its position might be more easily accepted, though still with misgivings. Such a view was suggested by the New Hampshire Supreme Court in the recent case of *White Mountain Freezer Co.* v. *Murphy*, 78 N. H. 398, where it was held that no privilege existed in respect of communications made to a labor commissioner (appointed under a statute providing for the arbitration of labor disputes) previous to a strike which became the subject of litigation. It is interesting to note that the New Hampshire legislature has since passed a statute (Laws 1917, c. 142, § 1) providing that such communications shall not be admissible

in evidence. But the majority opinion in the instant case does not even admit that the privilege ought to extend to such communications; it contends rather that the privilege should not exist, because it might tend to prevent the disclosure of facts which, the court felt, should have been disclosed in this particular instance. In this it ignores the considerations of public policy which have led to the almost universal recognition of all the phases of privileged communication, and also ignores the weighty reasons based on the peculiar requirement of confidence in the successful working out of the Juvenile Court Law. It is to be hoped that the Colorado legislature will soon repair the damage done by this decision. E. H.

LIQUIDATION OF DAMAGES BY PRE-ESTIMATE.—A freshly minted phrase, if attractive in form, even though it connotes no new idea, will frequently have as extensive a circulation, even in our supreme courts, as would a real concept. In a contract for building two laboratories for the Department of Agriculture, the contractor had agreed that the United States should be entitled to the "fixed sum of $200, as liquidated damages * * * for each and every day's delay" in the completion of the buildings. The court decided that this was a stipulation for liquidated damage because it was the result of a "genuine pre-estimate" of the anticipated loss. *Wise* v. *United States* (May, 1919), Adv. O. 343.

The use of this term, "pre-estimate", as a new canon of interpretation for distinguishing liquidated damages from penalty, seems to belong to the last two decades, but during that time it has had a flourishing existence and a continual misapplication. In the case of the *Sun Pub. Assoc.* v. *Moore* (1901), 183 U. S. 642, a yacht was rented to be used for gathering news, the parties agreeing that "for the purpose of this charter the value of the yacht shall be considered and taken at seventy-five thousand dollars." The court "refused to consider evidence tending to show that the admitted value was excessive". In the case of the *United States* v. *Bethlehem Steel Co.* (1906), 205 U. S. 105, in a contract for the delivery of disappearing gun-carriages, it was agreed that "the amount of the penalty for delay in delivery" was to be $35 per day. It was decided that this was liquidated damages and not a penalty, but the court said that "the principle decided in that case (*Sun Pub. Co.* v. *Moore*) is much like the contention of the government herein". These two cases and an intermediate English case, *Clydebank E. and S. Co.* v. *Castaneda,* [1905] A. C. 6, have since been quoted as though they were precedents, for decisions in our Federal and State courts and in England; and the English court uses the phrase "a genuine pre-estimate", which has since been repeated so often, and is given as the reason for the decision in our instant case. This phrase has been used so often by the courts that it seemed best to the revising editors of the last editions of Sedgwick's treatises on the subject of Damages to add, after a presentation of various canons of interpretation, a section on "VALUATION AND PRE-ASCERTAINMENT." *Cf.* SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, page 249, and SEDGWICK-BEALE, MEASURE OF DAMAGES, Section 420, a.